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September 30, 2004

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: July 8, 2004

Case No.: TIA-0132

XXXXXXXXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy for assistance in filing for state workers' compensation benefits based on the employment of her late husband, XXXXXXXXXXX (the worker). The DOE Office of Worker Advocacy determined that the applicant was not a contractor employee under the regulations at issue here and, therefore, was not eligible for DOE assistance. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

**I. Background**

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 73841(1). The DOL program also provides federal monetary and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385o. In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3).

The DOE program is specifically limited to DOE contractor employees<sup>1</sup> who worked at DOE facilities.<sup>2</sup> The reason is that the DOE would not be involved in state workers' compensation proceedings involving other employers.

The regulations for the DOE program are referred to as the Physician Panel Rule and are set forth at 10 C.F.R. Part 852. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program.<sup>3</sup>

Pursuant to an Executive Order,<sup>4</sup> the DOE has published a list of facilities covered by the DOL and DOE programs, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 69 Fed. Reg. 51,825 (August 23, 2004) (current list of facilities). The DOE's published list also refers readers to the DOE Worker Advocacy Office web site for additional information about the facilities. 69 Fed. Reg. 51,825.

## **II. The Appeal**

This case involves the program administered by the DOE that provides access for eligible DOE contractor employees or their survivors to a Physician Panel Process. The Physician Panel established under the EEOICPA determines the validity of claims that a current or former DOE contractor employee's illness or death arose from his or her exposure to a toxic substance during the course of his or her employment at a DOE facility.

In the case at hand, the DOE Worker Advocacy Office declined to present the applicant's application to a Physician Panel because the office determined that the applicant's late husband did not meet the eligibility requirements for the Physician Panel Process. *See* May 7, 2004 letter from DOE Worker Advocacy Office to the applicant.

In her hand-written appeal, the applicant claims that she has already provided all pertinent information to the DOE Worker Advocacy Office except a 1991 letter from her

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<sup>1</sup> A DOE contractor is defined as follows: (a) an individual who is or was in residence at a DOE facility as a researcher for one or more periods aggregating at least 24 months; (b) an individual who is or was employed at a DOE facility by (i) an entity that contracted with DOE to provide management and operation, management and integration, or environmental remediation at the facility; or (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility. 10 C.F.R. § 852.2.

<sup>2</sup> A DOE facility is defined as: any building, structure or premise, including the grounds upon which such building, structure, or premise is located: (a) in which operations are, or have been, conducted by, or on behalf of the DOE (except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344 dated February 1, 1982 (42 U.S.C. § 7158 note), pertaining to Naval Nuclear Propulsion Program); and (b) with regard to which DOE has or had (i) a propriety interest; or (ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services. 10 C.F.R. § 852.2.

<sup>3</sup> *See* [www.eh.doe.gov/advocacy](http://www.eh.doe.gov/advocacy).

<sup>4</sup> *See* Executive Order No. 13,179 (December 7, 2000).

late husband's doctor. The applicant provided us with a copy of the 1991 letter, along with her appeal.

### **III. Analysis**

#### **A. Factual Background**

According to the applicant, her late husband worked as a machinist for International Nickel Company (INCO) in Huntington, West Virginia from sometime in 1941 until July 1982. The applicant states that her husband suffered from stomach and esophageal cancer as a result of his exposure to toxic materials while working at INCO.

#### **B. Worker Programs**

It is important to emphasize that the DOE Physician Panel Process is separate from state workers' compensation proceedings. A DOE decision that an applicant is not eligible for the DOE physician panel process does not affect (i) an applicant's right to file for state workers' compensation benefits or (ii) whether the applicant is eligible for those benefits under applicable state law.

Similarly, we emphasize that the DOE Physician Panel Process is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning the Physician Panel Process does not affect any claims made under other statutory provisions, such as programs administered by DOL and DOJ.

We now turn to whether the applicant in this case is eligible for the DOE Physician Panel Process.

#### **B. Whether the Applicant is Eligible for the DOE Physician Panel Process**

As noted above, access to the DOE Physician Panel is limited to applications filed by or on behalf of a DOE contractor employee who is or was employed at a DOE facility. *See* 10 C.F.R. § 852.1(b). Under the EEOICPA, a worker who was employed by an Atomic Weapons Employer or a Beryllium Vendor is not eligible to use the DOE Physician Panel.

To determine whether the worker in question was a DOE contractor who worked at a DOE facility, we first consulted the DOE's published facilities list set forth at 69 Fed. Reg. 51,825. On that list, only one entry for the state of West Virginia appears. It is for the Huntington Pilot Plant in Huntington, West Virginia. We then consulted the website for the Office of Worker Advocacy where we discovered that the Huntington Pilot Plant is listed as a Department of Energy facility from 1951-1963 and 1978-1979. The facilities list also indicates that INCO was the contractor on the site from 1951 to 1963.

To understand why the applicant's late husband was not considered a DOE contractor at a DOE facility for at least the portion of his employment that covered the periods, 1951-1963 and 1978-1979, we contacted the DOE Office of Worker Advocacy. According to the DOE Office of Worker Advocacy, only the nuclear portion of the site in Huntington, West Virginia, was a Department of Energy facility under 10 C.F.R. § 852.2. The nuclear portion of the site in question is identified on the DOE's Environmental Management's website as the Reduction Pilot Plant.<sup>5</sup>

According to the Office of Worker Advocacy, it determined that the worker in question did not work at the Reduction Pilot Plant after obtaining documentation from Special Metals Corporation, a company that does employment verification for INCO. Specifically, a Human Resources Representative from Special Metals Corporation confirmed in a Memorandum dated September 12, 2002 that the applicant's late husband did not work for the Reduction Pilot Plant during any time of his 41 year employment with INCO or its successor companies. The Office of Worker Advocacy provided a copy of the subject memorandum for our review.

After reviewing the September 12, 2002 Memorandum from Special Metals Corporation, we conclude that the applicant's late husband was not a DOE contractor who worked at a DOE facility. For this reason, we find that the Office of Worker Advocacy correctly decided not to present the applicant's claim to the DOE Physician Panel. We reiterate, however, that our decision regarding the applicant's ineligibility in this case does not affect her eligibility for (i) state workers' compensation benefits or (ii) federal monetary and medical benefits under other statutory provisions, including EEOICPA claims at the Department of Labor.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0132 be, and hereby is, denied.
- (2) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: September 30, 2004

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<sup>5</sup> A Radiological Assessment Report for the site in question states that the Atomic Energy Commission built the Huntington Pilot Plant in 1951 to supply nickel powder for use in the Paducah and Portsmouth gaseous diffusion plants. The Report further states that one source of the nickel used in the plant was scrap nickel which was contaminated with uranium. According to the Report, the plant was shut down in 1963 and demolished in 1978-1979. See Formerly Utilized Sites Remedial Action Program data base for Huntington Pilot Plant accessed via [www.em.doe.gov](http://www.em.doe.gov).